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Commissioner

State of Georgia
Department of Revenue
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Frank M. O'Connell
Director

**NOTICE
IT-2011-1**

**RE: Proposed Amendment to the Department of Revenue, Income Tax Division,
Rule 560-7-8-.45, entitled "Film Tax Credit."**

TO ALL INTERESTED PERSONS AND PARTIES:

In compliance with O.C.G.A. § 50-13-4, the Georgia Department of Revenue gives notice that it proposes to amend Chapter 560-7-8 of the Rules and Regulations of the State of Georgia by amending Rule 560-7-8-.45, entitled "Film Tax Credit."

Attached with this notice are the exact copy and synopsis of the proposed Rule. The proposed Rule is being adopted under the authority of O.C.G.A. §§ 48-2-12 and 48-7-40.26.

The Department of Revenue shall consider the adoption of the above referenced Rule at 10:00 a.m. on Wednesday, April 27, 2011 in Suite 15200 of the Department's headquarters at 1800 Century Blvd NE Atlanta, GA 30345-3205.

The Department must receive all comments regarding the above referenced proposed Rule from interested persons and parties no later than 10:00 a.m. on Wednesday, April 27, 2011. Written comments must be sent to: Commissioner, Georgia Department of Revenue, 1800 Century Blvd. N.E., Suite 15300, Atlanta, GA 30345-3205. Electronic comments must be sent to regcomments@dor.ga.gov. Facsimile comments must be sent to (404) 417-6651. **Please reference "Notice Number IT-2011-1" on all comments.**

Dated: March 23, 2011

Douglas J. MacGinnitie
Commissioner
Georgia Department of Revenue

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SYNOPSIS

GEORGIA DEPARTMENT OF REVENUE INCOME TAX DIVISION

CHAPTER 560-7-8 RETURNS AND COLLECTIONS

560-7-8-.45 Film Tax Credit.

Rule 560-7-8-.45 is being amended to clarify certain provisions of the rule. This Rule is necessary for the effective administration of the Department's duties under O.C.G.A. § 48-7-40.26.

Paragraph (1) provides the purpose of the regulation.

Paragraph (2) provides for the coordination of the Department of Revenue and the Department of Economic Development in administering the statute.

Paragraph (3) provides the definition of "Film Tax Credit."

Paragraph (4) provides information regarding the threshold determination for a production company and its affiliates and the assignment of the credit by the production company to its affiliates.

Paragraph (5) provides information regarding the Department of Economic Development's certification process.

Paragraph (6) provides information and examples regarding the projects that qualify for the base investment and the production expenditures that qualify for the credit.

Paragraph (7) provides the procedure for a production company to claim the credit.

Paragraph (8) specifies the conditions and limitations for utilizing the credit.

Paragraph (9) specifies how a pass-through entity utilizes the credit.

Paragraph (10) provides that the credit can be sold or transferred and provides conditions on selling or transferring the credit.

Paragraph (11) provides the procedures for selling or transferring the credit and provides examples.

**RULES
OF
DEPARTMENT OF REVENUE
INCOME TAX DIVISION**

**CHAPTER 560-7-8
RETURNS AND COLLECTIONS**

TABLE OF CONTENTS

560-7-8-.45 Film Tax Credit.

560-7-8-.45 Film Tax Credit.

(1) **Purpose.** This rule provides guidance concerning the implementation and administration of the income tax credits contained within the Georgia Entertainment Industry Investment Act (hereinafter "Act") under O.C.G.A. § 48-7-40.26.

(2) **Coordination of Agencies.** The Department of Economic Development is the state agency responsible for determining which projects qualify for the tax credits authorized under the Act.

(3) **Definition.** "Film Tax Credit" means the credit allowed pursuant to the Georgia Entertainment Industry Investment Act, O.C.G.A. § 48-7-40.26.

(4) **Affiliates.**

(a) **Threshold Determination.** O.C.G.A. § 48-7-40.26(c) and (d) discuss the investment of a production company and its affiliates. The affiliates are included solely to determine whether or not the \$30 million expenditure threshold has been exceeded for the purpose of determining under which of these subsections the film tax credit will be calculated. Once that determination is made,

the \$500,000 base investment threshold or excess base investment threshold is calculated for each separate production company and the film tax credit is earned solely by the production company which has qualified investment expenditures in a state certified production. If more than one affiliated production company has qualifying productions in Georgia, then each production company will calculate its film tax credit independently of its affiliates.

(b) Assignment of Credit to Affiliates. Once the production company establishes the amount of the film tax credit by filing the tax return for the taxable year in which the credit was earned, the credit may then be assigned to the production company's affiliates under the provisions of O.C.G.A. § 48-7-42. When a film tax credit is assigned to an affiliated entity, the affiliated entity may apply the credit solely against its own income tax liability. The affiliated entity may not sell or transfer the credit pursuant to paragraph (10) of this rule and may not claim any excess film tax credit against its withholding tax. Any unused credit may be carried forward by such affiliated entity until the credit is used or it expires, whichever occurs first.

(5) **Certification of Qualified Production Activities.** Prior to claiming the film tax credit (which includes the additional tax credit for including the qualified Georgia promotion), each new film, video, or digital project must be certified by the Department of Economic Development. Production companies that are required to reduce their investment basis by the amount of expenditures in prior years, must receive certification from the Department of Economic Development for current year projects prior to claiming the film tax credit. The Department of Economic Development will provide a Credit Certificate Number to the production company for each qualifying project which is approved. The credit certificate number(s) will be used to report any transfer or sale of film tax credit by the production company for the qualifying project(s).

(6) Production Expenditures.

(a) Base Investment. A production company can aggregate projects over a single tax year to meet the \$500,000 investment threshold or excess base investment threshold. A television series (which can occur over two or more years), series pilot, or television movie shall each be considered a single television project. In the case of an episodic television series, an entire season of episodes is one project.

1. Example 1: A production company produces 20 commercials in one calendar year, and each commercial has \$25,000 in production expenditures. The production company can aggregate their production expenditures for multiple commercials in one calendar year ($20 \times \$25,000 = \$500,000$) to meet the \$500,000 base investment threshold.

2. Example 2: A production company has \$900,000 in production expenditures during two years (they spend \$300,000 in year 1 and \$600,000 in year 2) producing one television movie. The production company may aggregate their production expenditures over the two years for this single project (one television movie) to achieve the \$500,000 base investment threshold. The production company can claim the credit in the year the \$500,000 base investment has been achieved.

(b) Direct use. A production company may only claim production expenditures that are directly used in a qualified production activity. In determining whether an expenditure is directly used in a qualified production activity, the Department of Revenue will consider the proximity of the expenditure to the activity as well as the causal relationship between the expenditure and the activity.

(c) Production expenditures include preproduction, production, and postproduction expenditures incurred in this state that are directly used in a qualified production activity, including without limitation the following: set construction and operation; wardrobes, make-up, accessories, and related services; costs associated with photography and sound synchronization, lighting, and related services and materials; editing and related services; rental of facilities and equipment; leasing of vehicles; costs of food and lodging; digital or tape editing, film processing, transfers of film to tape or digital format, sound mixing, computer graphics services, special effects services, and animation services; total aggregate payroll; airfare, if purchased through a Georgia based travel agency or travel company; insurance costs and bonding, if purchased through a Georgia based insurance agency; and other direct costs of producing the project in accordance with generally accepted entertainment industry practices. This term shall not include postproduction expenditures for marketing and distribution.

(d) Depreciation, amortization, or other expense on production expenditures with a useful life of more than one year. The costs of production expenditures with a useful life of more than one year are considered "other direct costs of producing the project in accordance with generally accepted entertainment industry practices." Such costs shall be included in the computation of the film tax credit for the taxable year based upon the depreciation, amortization, or other expense included in the computation of Georgia taxable income of the production company for the applicable taxable year. Such depreciation, amortization, or other expense shall be prorated based upon the time the asset is used in qualified production activities in this state. Depreciation, amortization, or other expense on expenditures incurred before the pre-production period shall not be included in the computation of the Film Tax Credit in this state. In order to claim depreciation, amortization, or other expense, the expenditure for the asset that

generated the depreciation, amortization, or other expense, must have been incurred in this State as provided in subparagraph (6)(f) of this rule.

(e) Georgia based agency or company. In order to include production expenditures for airline or insurance costs, the expenditure must have been made through an agency or company whose headquarters are located in Georgia.

(f) Production expenditures incurred in this state. In order to be considered to have been incurred in this state, the following rules shall apply:

1. Production expenditures, which are attributable to the performance of services by individuals and companies directly at the filming site in Georgia who were not employees of the production company, shall be attributed to Georgia in the same manner as salaries as provided in subparagraph (6)(g) of this rule.

2. Except as otherwise provided in this regulation, expenditures for services which are not performed at the filming site (such as insurance, editing and related services, digital or tape editing, film processing, transfers of film to tape or digital format, sound mixing, computer graphics services, special effects services, animation services, etc.) will be allowed if the vendor is a Georgia vendor (or in the case of insurance if purchased from an agency or company whose headquarters are located in Georgia) and will be attributed to Georgia if the service is rendered in Georgia. If the production company is unable to track the actual time spent in Georgia, then some other reasonable method which approximates the actual time spent in Georgia may be used to determine the amount attributable to Georgia. In the event the services are subcontracted to a company that would not otherwise qualify and/or such subcontracted company renders the services outside

Georgia, the expenditure for such services shall not be considered to have been incurred in this state.

3. Purchases and rentals of property. In order to include production expenditures for purchases and rentals of property, the property must have been used in Georgia and purchased or rented from a Georgia vendor. Purchase receipts, invoices, contracts, or other documentation shall be used to determine this.

4. Georgia Vendor. For purposes of this rule, a Georgia vendor is a vendor that:

(i) Sells or rents property, which is the subject of the production expenditure, in their ordinary course of business; and

(ii) Has a physical location in Georgia with at least one individual working at such location on a regular basis. Registering with the Georgia Secretary of State or appointing a registered agent in Georgia does not establish a physical location in Georgia.

However, a vendor that acts as a conduit to enable purchases and rentals to qualify that would not otherwise qualify shall not be considered a Georgia vendor with respect to such purchases and rentals.

(g) Salaries. Total aggregate payroll, as such term is used in the Act, includes bonuses, incentive pay, and other compensation paid to an employee which is included in the employee's Form W-2 "Wage and Tax Statement". Reimbursed expenses, per diems, or employer paid benefits and taxes are not included in aggregate payroll unless such amounts are included as wages, tips, or other compensation in the employee's Form W-2 "Wage and Tax Statement". For purposes of this rule, the term "employee" means any officer of a corporation or any individual who, under the Internal Revenue Service rules applicable in determining the

employer-employee relationship, has the status of an employee. Only amounts included in total aggregate payroll shall be subject to the \$500,000 limit provided in O.C.G.A. § 48-7-40.26(b)(10). Except as otherwise provided in this paragraph, if the production company is unable to track the actual time spent by an employee in Georgia, the production company may calculate the total aggregate payroll in Georgia by multiplying the total payroll of employees who worked in Georgia by a ratio. Such ratio shall be computed by dividing the shooting days in Georgia in the state certified production by the total shooting days spent in the state certified production. For directors, producers, and other individuals who are paid a separate amount for preproduction, for actual production, and for post production, the amount that is incurred in Georgia shall be based on the amount paid for each such period and prorated based on the actual time spent in Georgia by the employee in each such period. The following example illustrates how to apply the shooting days method:

1. Example: A production company has 125 employees on a state certified production in Georgia. The production company shoots in Georgia for 4 days out of a total of 60 shooting days. The total aggregate payroll for those 125 employees is \$400,000. \$26,667 [\$400,000 multiplied by (4 days divided by 60 days)] of payroll would qualify as a production expenditure.

(h) Fringe Benefits. The following benefits are attributed to Georgia in the same manner as salaries as provided in subparagraph (6)(g) of this rule:

1. SUI (state unemployment insurance);
2. FUI (federal unemployment insurance);
3. FICA (employer portion);

4. Pension and welfare if the amounts are paid as part of pension, health, and welfare plans (these would not be required to be paid to a Georgia vendor);

5. Health insurance premiums if these amounts are paid as part of pension, health, and welfare plans (these would not be required to be paid to a Georgia based insurance agency or company); and

6. Service fees paid to a payroll company (this includes workers compensation) but only if the payroll company is a Georgia vendor.

(i) Other Fringe Benefits. The following fringe benefits are attributed to Georgia as follows:

1. Meal per diems if incurred in Georgia, and
2. Hotel per diems if incurred in Georgia.

(7) Production Company Claiming Credit.

(a) Income tax. For a production company to claim the film tax credit, it must attach Form IT-FC "Film Tax Credit" and the Department of Economic Development credit certification(s) to its Georgia income tax return for each tax year in which the qualified expenditures were incurred.

(b) Withholding Tax. The production company may claim any excess film tax credit against its withholding tax liability. The withholding tax benefit may only be applied against the withholding tax account used by the production company for payroll purposes. In the event the production company is a single member limited liability company that is disregarded for income tax purposes, the withholding tax benefit may only be applied against the withholding tax liability that is attributable to wages

paid by the single member limited liability company. Any production company that qualifies to take all or a part of the film tax credit against withholding tax otherwise due the Department of Revenue, must make an irrevocable election to do so as a part of its notification to the Commissioner required under this subparagraph. When this election is made, the excess film tax credit will not pass through to the shareholders, partners, or members of the production company if the production company is a pass-through entity.

1. Notice of Intent. To claim any excess film tax credit not used on the income tax return against the production company's withholding tax liability, the production company must file Revenue Form IT-WH *Notice of Intent* at least thirty (30) days prior to the due date of the Georgia income tax return (including extensions) or at least thirty (30) days prior to the filing of the income tax return, whichever occurs first. Failure to file this form as indicated will result in disallowance of the withholding tax benefit. However, in the case of a credit which is earned in more than one taxable year, the election to claim the withholding credit will be available for the credit earned in such subsequent year.

2. Review Period. The Department of Revenue has ninety (90) days from the date the income tax return claiming the film tax credit is received to review the credit and make a determination of the amount eligible to be used against withholding tax.

3. Letter of Eligibility. Once the review is completed, a letter will be sent to the production company stating the film tax credit amount which may be applied against withholding and when the production company may begin to claim the film tax credit against withholding tax. The Department of Revenue shall treat this amount as a credit against future withholding tax payments and will not refund any previous withholding payments.

(c) Use of Other Tax Credits. Production companies claiming the film tax credit may not claim the job tax credit, headquarters tax credit, or quality jobs tax credit for employees whose wages are used to calculate the film tax credit.

(8) Conditions and Limitations.

(a) A production company must provide the Department of Revenue with sufficient detail of all qualifying expenditures used to meet the base investment and calculate the film tax credit.

(b) Except as otherwise provided, a taxpayer may utilize the film tax credit only to the extent of the taxpayer's income tax liability in a given tax year.

(c) There is a five-year carry forward period from the end of the tax year in which the qualifying expenditures were made and the production company established the amount of the film tax credit for such tax year. Any film tax credits that cannot be used against a taxpayer's income tax liability in the year established will be carried forward. For example, the amount of a film tax credit established in the calendar 2005 tax year may be carried forward until it expires on December 31, 2010.

(d) Film tax credits may not be carried back and applied against a prior year's income tax liability.

(e) Any Department of Revenue audit triggered by a production company's use or transfer of a film tax credit will require the production company to reimburse the Department of Revenue for all costs associated with the audit. The Department of Revenue will inform the production company that the audit is a film tax credit audit and thus subject to this clause prior to the commencement of the audit. Routine audits of the taxpayer's activity in Georgia are not subject to this provision.

(9) **Pass-Through Entities.** When a production company generating a film tax credit is a pass-through entity, and has no income tax liability of its own, the film tax credit will pass to its members, shareholders, or partners based on the year ending profit/loss percentage. The credit forms will initially be filed with the tax return of the production company that incurred the qualifying expenditures to establish the amount of the film tax credit available for pass through. The credit will then pass through to its shareholders, members, or partners to be applied against the tax liability on their income tax returns. The shareholders, members, or partners may not claim any excess film tax credit against their withholding tax liabilities. The credits are available for use as a credit by the shareholders, members, or partners for their tax year in which the income tax year of the pass-through entity ends. For example: A partnership earns the credit for its tax year ending January 31, 2006. The partnership passes the credit to a calendar year partner. The credit is available for use by the partner beginning with the calendar 2006 tax year.

(10) **Selling or Transferring the Film Tax Credit.** The production company may sell or transfer in whole or in part any film tax credit, previously claimed but not used by such production company against its income tax, to another Georgia taxpayer subject to the following conditions:

(a) Each sale or transfer, except the final sale or transfer, must be for at least \$100,000. The final sale is the sale that results in the remaining balance of film tax credits earned in a taxable year being sold.

(b) Each sale or transfer must be for a minimum of 60 percent of the credit amount being sold in each respective sale (i.e., the minimum price for each dollar of credit included in an installment must be at least 60 cents). The production company may only

~~make a one-time sale or transfer of film tax credits earned in each taxable year. However, the~~

~~(c) Each sale or transfer may involve more than one transferee; each transferee can purchase an odd dollar amount so long as the total for the sale or transfer equals at least \$100,000. Such one-time~~ The sale may occur in a year or years after the film tax credit is earned but must occur before the expiration of the carry forward period of such credit. ~~Carry-forward attributable to previously sold or transferred film tax credit cannot be sold.~~

1. Example: ~~A production company earns and claims \$900,000 film tax credit in tax year 2006. In tax year 2006, the production company uses \$100,000 of the film tax credit earned in tax year 2006 against its income tax liability. In tax year 2008, the production company sells \$600,000 of the film tax credit earned in tax year 2006 to a Georgia taxpayer. The remaining \$200,000 of the film tax credit earned in tax year 2006 is carry forward attributable to previously sold or transferred film tax credit and thus it cannot be sold. A production company earns and claims \$987,000 film tax credit in tax year 2009. On April 15, 2010, the production company sells \$910,000 of the film tax credit earned in tax year 2009 to two Georgia taxpayers, one transferee purchases \$839,000 and the other transferee purchases \$71,000. On April 15, 2011, the production company sells \$77,000, the remaining balance of the film tax credit earned in tax year 2009 (final sale), to two Georgia taxpayers, one transferee purchases \$34,000 and the other transferee purchases \$43,000.~~

(bd) The film tax credit may be transferred before the tax return is filed by the production company. However, the amount transferred cannot exceed the amount of the credit which will be claimed and not used on the income tax return of the transferor.

~~(c) The film tax credit must be sold for a minimum of 60 percent of the credit amount.~~

(de) The production company must file Form IT-TRANS "Notice of Tax Credit Transfer" with both the Department of Economic Development and Department of Revenue within 30 days of the each transfer or sale of the film tax credit.

(ef) The production company must provide all required film tax credit detail and transfer information to the Department of Revenue. Failure to do so will result in the film tax credit being disallowed until the production company complies with such requirements.

(fg) The carry forward period of the film tax credit for the transferee will be the same as it was for the production company. This credit may be carried forward for five years from the end of the tax year in which the qualifying expenditures were incurred. For example: The production company sells a film tax credit on September 15, 2006. This credit is based on qualifying expenditures from the calendar 2005 tax year. The credit may be claimed by the transferee on the 2005, 2006, 2007, 2008, 2009, or 2010 return and the carry forward period for this credit will expire on December 31, 2010. This carry forward treatment applies regardless of whether it is being claimed by the production company or the transferee.

(gh) A transferee shall have only such rights to claim and use the Film Tax Credit that were available to the production company at the time of the transfer excluding the withholding tax benefit which is not available to the transferee. Thus, a transferee shall not have the right to subsequently transfer such credit since that right has been utilized by the transferor.

(11) How to Sell or Transfer the Tax Credit.

(a) Direct Sale. The production company may sell or transfer the film tax credit directly to a Georgia taxpayer (or multiple Georgia taxpayers as provided in subparagraph (10)(a) of this rule). A pass-through entity may make ~~a one-time~~ an election to sell or transfer the unused film tax credit earned in a taxable year at the entity level. If the pass-through entity makes the election to sell the film tax credit at the entity level, the credit does not pass through to the shareholders, members, or partners. In all cases, the effect of the sale of the credit on the income of the seller and buyer of the credit will be the same as provided in the Internal Revenue Code.

(b) Pass-Through Entity. The production company may be structured as a pass-through entity. If a pass-through entity does not make ~~a one-time~~ an election to sell or transfer the tax credit at the entity level as provided in subparagraph (11)(a) of this rule, the tax credit will pass through to the shareholders, partners or members of the entity based on their year ending profit/loss percentage. The shareholders, members, or partners may then sell their respective film tax credit to a Georgia taxpayer.

(c) Transferee Pass-Through Entity. The production company, or its shareholders, members or partners, may sell or transfer the tax credit to a pass-through entity. The pass-through entity shall elect on behalf of its shareholders, members or partners which year the credit shall be passed through to its shareholders, members or partners (either its tax year in which the income tax year of the production company, which claims the film tax credit for the project or project(s) associated with the credit being sold, ends; or during any later tax year before the five year carry forward period associated with the tax credit ends as provided in subparagraph (11)(d) of this rule). If the pass-through entity has no income tax liability of its own, the pass-through entity may then pass the credit through to its shareholders, members, or partners

based on the pass-through entity's year ending profit/loss percentage for such elected year. For example, if a calendar year partnership is buying the credit earned by a production company in the calendar 2005 tax year and elects to use the credit for such year, then all of the partners receiving the credit must have been a partner in the partnership no later than the end of the 2005 tax year in which the credit was established. Only partners who have a profit/loss percentage as of the end of the applicable tax year may receive their respective amount of the film tax credit.

(d) The credits are available for use by the transferee, provided the time has not expired for filing a claim for refund of a tax or fee erroneously or illegally assessed and collected pursuant to O.C.G.A. § 48-2-35:

1. In the transferee's tax year in which the income tax year of the production company, which claims the film tax credit for the project or project(s) associated with the credit being sold, ends; or
2. During any later tax year before the five year carry forward period associated with the tax credit ends.

(i) Example: A production company reaches the \$500,000 base investment threshold and claims the film tax credit in calendar 2009 tax year. The production company sells the film tax credit to a Georgia taxpayer in calendar 2010 tax year. The transferee Georgia taxpayer may claim the purchased film tax credit on either their 2009 return (transferee's tax year in which the income tax year of the production company ends) or their 2010, 2011, 2012, 2013, or 2014 return (during any later tax year before the five year carry forward associated with the tax credit ends).

Authority: O.C.G.A. §§ 48-2-12 and 48-7-40.26.